

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**OUR LADY OF ANGELS**

**Employer**

**And**

**Case 13-RC-21276**

**UNITED FOOD & COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
LOCAL 1546, AFL-CIO, CLC**

**Petitioner**

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on December 14, 2004, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.<sup>1</sup>

**I. Issues**

The United Food and Commercial Workers International Union, Local 1546, AFL-CIO, CLC (herein the Petitioner) seeks an election within a unit comprised of all full-time and part-time licensed practical nurses (LPNs) employed by the Employer.

The issue to be decided by the Regional Director is whether the LPNs employed by the Employer are supervisors as defined by Section 2(11) of the Act who must be excluded by the unit. The Employer's position is that the LPNs are statutory supervisors and consequently, the petition must be dismissed. The Petitioner maintains that the LPNs are employees and eligible for representation. There are approximately 19 employees in the unit sought by the Petitioner.

**II. Decision**

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<sup>1</sup> Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

Based on the entire record in this proceeding and for the reasons set forth below, I find that the record establishes that the LPNs have authority to assign employees and approve overtime, and are statutory supervisors as defined by Section 2(11) of the Act.

Accordingly, IT IS HEREBY ORDERED that the petition in the above matter be, and it hereby is, dismissed.

### **III. Statement of Facts and Analysis**

The Act expressly defines the term “supervisor” in Section 2(11), which provides:

The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend lay off, recall promote, discharge, assign reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.  
29 U.S.C. § 152(11).

The Supreme Court has interpreted the text of the above-quoted statute to set forth a three-part test for determining supervisory status. *N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001), citing, *N.L.R.B. v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994). Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” *Id.* While the Board has reasonable discretion in interpreting whether the degree of judgment exercised in one of the 12 categories falls within the “routine” or “clerical” category, once the Board has determined that the judgment exercised is independent in nature, the individual in question is deemed to be a supervisor under Section 2(11) of the Act. *Kentucky River*, 532 U.S. at 717. Finally, the burden of proving supervisor status rests solely upon the party claiming it. *Id.* at 711.

The Employer, Our Lady of Angels (OLA) is a not-for-profit retirement community comprised of a licensed nursing home, a sheltered care retirement assisted living facility, a convent and convent infirmary, and some independent living senior apartments. OLA is an intermediate care facility licensed by the Illinois Department of Public Health. Intermediate care is the lowest level of nursing home licensure and is not a skilled nursing facility. OLA is sponsored by the Congregation of the Third Order of St. Francis of Mary Immaculate, more commonly known as the Joliet Franciscan Sisters.

As an intermediate or custodial care facility, OLA’s nursing department is staffed by RNs, LPNs, certified nurse aides, and unit aids. The nursing department employs approximately 105 employees and operates three shifts everyday of the year. The department is managed by the

Director of Nursing (DON), also referred to as the Department Head<sup>2</sup>, who reports to the Administrator/CEO. The DON is assisted by the Assistant Director of Nursing (ADON). OLA also has House Supervisors, who are registered nurses (RNs) who oversee operations in the absence of the DON, ADON, and Administrator during the evenings and weekends.

Day-to-day care of the residents of OLA is provided by a combination of RNs, LPNs, CNAs, and Unit Aids. Each wing of the Employer's facility functions as a hall and each hall is assigned a charge nurse for each shift. The charge nurse is responsible for all the care that is provided to the residents of that hall. About half of the charge nurses are RNs and the rest are LPNs. Each charge nurse is assisted by approximately four to 16 CNAs, depending on the shift, who provide the personal care assistance needed by the residents, such as bathing, showering, feeding, assisting with toilet functions, changing bedpans, changing bed linens, and performing simple procedures such as taking blood pressure, temperatures, or pulse. The nursing department also employs Unit Aids, who are not certified to provide any personal care to residents. They typically help in the dining room, help with the nutrition/hydration program, and otherwise provide assistance that does not require CNA certification.

During a typical shift, the charge nurse<sup>3</sup> of a hall supervises the CNAs working during the shift and may determine which CNA should assist with certain residents. However, CNAs are very familiar with the resident such that CNAs have an idea about which residents they will be caring for during their shift and typically have particular residents to whom they are assigned. Charge nurses may ask a CNA to assist a resident not initially assigned to that CNA because the assigned CNA is busy with another resident. In making these reassignments, the charge nurse considers several factors such as (1) how familiar a CNA is with the residents involved; (2) how much experience a CNA has; (3) how the charge nurse has interacted with the CNA in the past; and (4) the CNA's weaknesses and strengths.

Charge nurses at OLA are involved in some administrative responsibilities, such as filling out CNAs' Overtime and Manual Time Clock Punch Reports. Although the charge nurse initially fills out these forms, documenting the date and overtime accrued by an employee and sometimes the reason why the overtime was deemed necessary. The forms are ultimately signed by the Department Head to ensure that the overtime is within the Employer's budget, and further signed by the Business Office Manager to note that the actual payment of overtime was entered into the Employer's payroll system. However, according to Administrator and CEO Stephen McMillin, neither the Department Head nor the Business Office Manager conducts any investigation into the circumstances of the overtime or manual time clock punch, and the charge nurse's signature on the form indicates that it is approved.

Charge nurses also fill out "Absence/Late Forms" that document the days or times that an employee is late or off from work. The Employer's current employee handbook clearly states that only the Department Head has the authority to approve any personal days. The handbook also states that absenteeism and tardiness are monitored by the Department Head.

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<sup>2</sup> "Department Head" and "DON" are used interchangeably and both refer to the Director of Nursing.

<sup>3</sup> The Petitioner does not seek to represent RNs. Accordingly, unless otherwise noted, the discussion regarding charge nurses refer only to LPNs who work in that capacity.

Employees are evaluated on a regular basis, typically 90 days after hire, then annually thereafter. Evaluations are conducted by the DON and/or ADON and sometimes, charge nurses who work with the particular employee may sit in on the evaluation. While charge nurses may offer oral or written comments regarding their work experience with an employee, the evaluations are completed by the Department Head and are discussed with employees by the Department Head as well.

LPNs have no authority to hire, fire, promote, suspend, layoff, or recall employees. LPNs cannot require employees to work past their shift. LPNs also do not discipline employees. The employee handbook clearly establishes that discipline is issued by the Department Head and then submits the warnings to the Human Resource Director to be placed in the employee's file. LPNs have no authority to approve vacation requests, personal days and other time-off requests, such as jury duty. There is also no dispute that LPNs do not have authority to grant wage increases or bonuses or shift differentials.

Applying the above principles to the facts of the instant case, I find that the Employer has met its burden of proving that the LPNs are supervisors within the meaning of Section 2(11) of the Act. As charge nurses, the LPNs direct the CNAs as they provide OLA's residents with daily personal care, and approve employees' accrual of overtime, timecard corrections, and absences or tardies. Further, I find that the LPNs, in performing these functions, exercise sufficient independent judgment to find supervisory authority.

The undisputed record evidence demonstrates that the LPNs' direction of CNAs during their shifts involves significant independent judgment. In making assignments, the charge nurse considers the amount of care the patient needs, the CNA's experience, and the CNA's strengths and weaknesses.

The Petitioner contends that the charge nurses' assignment of tasks is routine and that the LPNs are simply utilizing available CNAs to fulfill the residents' needs, and that such routine assignments to certain employees are not exercises of independent judgment sufficient to confer supervisory authority on an individual. However, the Petitioner's cases in support of this position are distinguishable. In *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1138-39 (1999), the Board found that RN team leaders did not exercise the requisite independent judgment when they assigned tasks to members of their team based on patients' needs and which team member had the obvious required skills. However, the teams led by the RNs in that case were multi-disciplinary, including respiratory therapists and licensed vocational nurses as well as CNAs. Because of that factor, the Board found that the assignments were dictated by which team member had the obvious required skill, and accordingly did not involve the use of independent judgment. And unlike in *Loyalhanna Health Care Associates*, 332 NLRB 933, 935 (2000), the charge nurses' assignment of CNAs is more than the "routine deployment of available aides to serve a particular patient population" because it is based on their independent assessment of the CNA's skills and experience.

The LPNs' role in approving certain employee actions, such as overtime, absences, tardies, and timecard corrections, also constitutes supervisory authority. According to the only witness, Administrator and CEO McMillin, the approval of each of those actions is final once the

charge nurse signs the appropriate form. While the Department Head and Business Office Manager also sign such forms, their signatures only indicate that they have reviewed the forms for budgetary and administrative functions, and the record contains no instances where an LPN's decision to approve an action was overruled.

Accordingly, because the LPNs assign work and approve overtime, lateness and absences, and manual time card entries, with the exercise of independent judgment, I find that the LPNs are supervisors within the meaning of Section 2(11) of the Act. Therefore, I find that the petitioned for is inappropriate.

#### **IV. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **January 20, 2005**.

DATED at Chicago, Illinois this 6<sup>th</sup> day of January, 2005.

*/s/Roberto G. Chavarry*

Regional Director  
National Labor Relations Board  
Region 13  
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CATS — Unit – Health Care; Voter Eligibility – Statutory Exclusions (Supervisors)

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